

BARBRA CHIMANI
and
TICHAFU MAGIYA
versus
EVA MAGIYA

HIGH COURT OF ZIMBABWE
TAGU & MAXWELL JJ
HARARE, 21 June & 2 November 2022

Civil Appeal

AT Mbotya, for the appellants
B Mazhetese, for the respondent

TAGU J: This is an appeal against part of the judgment of the Magistrate sitting at Harare Civil Magistrate court on 7 December 2021.

BACKGROUND FACTS

The second appellant and the respondent are husband and wife married on 22 September 1993 under [*Chapter 5:11*] and their marriage still subsists. See exhibit 1 (the marriage certificate). Both jointly owned Stand Number 5868 Westlea, Harare, and regarded it as their matrimonial home as per exhibit 2 (the memorandum of agreement signed by the parties). The first appellant and the respondent are blood sisters. The first appellant was engaging in an adulterous relationship with the second appellant who happens to be the respondent's husband. This went on until the respondent was tipped of the illegal affair. At one time the first appellant seemed to have stopped the affair and left the matrimonial home, but alas, she continued. About three children were born out of the adulterous affair. This adulterous relationship led to the respondent temporarily leaving the matrimonial house due to physical abuse perpetrated by the second appellant who was now in love with the first appellant. Meanwhile the first appellant moved into the first appellant and respondent's matrimonial house. In the court below, the respondent instituted an action against the appellants under case number 525/21 claiming US\$7 200 being rentals allegedly collected since April 2019 to date of issuance of summons, interest at the prescribed rate from second appellant

and costs on a higher scale. She also claimed the eviction of the first appellant from House Number 5868 Westlea, Harare. The court *a quo* dismissed the first claim but granted the second claim for the eviction of the first appellant from Stand Number 5868 Westlea, Harare.

Grieved by the decision of the court *a quo*, for evicting the first appellant from Stand Number 5868 Westlea, Harare the appellants noted an appeal to this court. That is the appeal this court is seized with.

GROUND OF APPEAL

1. The Honourable Magistrate erred on a point of law when she ordered the eviction of 1st Defendant and not taking into cognizance that the property called Stand Number 5868 Westlea, Harare was subject to matrimonial proceedings at the High Court of Zimbabwe under case number 1278/21.
2. The Honourable Magistrate erred on a point of fact when she made a finding that the property called Stand Number 5868 Westlea was co-owned when there was no court order confirming such state of affairs.
3. The Honourable Magistrate in the court *a quo* erred on a point of law by applying the legal principle of *rei vindicatio* when the respondent did not have the rights of an owner of the immovable property known as Stand Number 5868 Westlea, Harare.

APPLICATION OF THE LAW TO THE FACTS

1. **Whether or not the Honourable Magistrate erred on a point of law when she ordered the eviction of first appellant and not taking into cognizance that the property called Stand Number 5868 Westlea, Harare was subject to matrimonial proceedings at the High Court of Zimbabwe under Case Number 1278/21**

In their first ground of appeal the appellants take issue with the fact that the court *a quo* erred on a point of law when it ordered the eviction of first applicant without taking cognizance that the property called Stand Number 5868 Westlea, Harare was subject to matrimonial proceedings at the High Court under Case Number 1278/21. I read the whole file thoroughly. The fact that the house in question was subject to matrimonial proceedings at the High Court under Case Number HC 1278/21 was never pleaded and the court never dealt with that issue. Neither was it an issue before the court *a quo*. It is being raised for the first time on appeal. However, the

counsel for the appellant withdrew the first ground of appeal. In any case this ground of appeal had no merit.

2. Whether or not the Honourable Magistrate erred on a point of fact when it made a finding that the property called Stand Number 5868 Westlea, Harare was co-owned when there was no court order confirming such state of affairs

In deed in this case there is no court order confirming that Stand Number is Co-owned by the second appellant and the respondent. However, at p 67 of the record is a Memorandum of Agreement made and entered into by and between THE CITY OF HARARE (as the Seller) and Mr Tichafa Magiya and Eva Magiya (as buyers) of Stand Number 5868 Westlea, Harare. This was enough evidence before the court *a quo* that Stand Number 5868 Westlea, Harare was co-owned by the second appellant and the respondent. I found that the court *a quo* did not err at all. This ground of appeal is dismissed.

3. Whether or not the Honourable Magistrate in the court *a quo* erred on point of law by applying the legal principle of *rei vindicatio* when the respondent did not have the rights of an owner of the immovable property known as Stand Number 5868 Westlea, Harare

The appellants' contention is that the respondent did not have the rights of an owner of the immovable property known as Stand Number 5868 Westlea, Harare as such the principle of *rei vindicatio* did not apply. As I have already stated in dismissing the second ground of appeal, it is clear that the respondent has a clear right over the Stand in question by virtue of the Memorandum of Agreement she entered into together with the second appellant and the City of Harare. Even if the court *a quo* was wrong in applying the principle of *rei vindicatio*, the court *a quo*'s reasoning cannot be faulted. The court on page 16 of the record (p 26) of the cyclostyled judgment had this to say:

“...It was apparent to this court that plaintiff is a co-owner of stand number 5868 Westlea Harare, this fact is common cause and was not disputed. From the court's assessment, it therefore follows that as a co-owner she has superior real rights to those of indirect beneficiaries like people cohabiting in the other Co-owner or visitors of the other co-owner. It is the court's view that 1st defendant is claiming to have rights to cohabit with a lover who is 2nd defendant in this case and 1st defendant concedes that she is not owner of the property. In the eyes of this court a right to cohabit with a lover is at best a personal right and not a real right. From the court's assessment plaintiff in this case as a co-owner she has real rights which are superior to those of 1st defendant who only has

personal rights through 2nd defendant whom she is cohabiting with. Plaintiff having superior rights over 1st defendant she has the right as owner to vindicate her property from 1st defendant who is in control of it as a person cohabiting.

Assessing the facts further from another angle, it is the court's view that since it was mentioned and not disputed that plaintiff and 2nd defendant are still legally married in terms of chapter 5.11 and that 1st defendant is an adulterous affair with 2nd defendant, it follows that 1st defendant is claiming rights from an unlawful relationship or agreement of cohabiting with a married man, married under [Chapter 5:11] a monogamous relationship. It is the court's view that a party from an illegal or unlawful relationship is basically in an unlawful contract/agreement and such party cannot derive rights from such an illegal contract. It has been held in the case of *Mac Foy v United Africa Pvt Ltd* 1961 (3) ALL ER 1169 that if an act is void, then it is in law a nullity there is no need for an order of court to set it aside. It is automatically null and void without more ado although sometimes it is convenient to have a court declare it so."

I associate myself fully with the reasoning of the court *a quo*. For these reasons the third ground of appeal has no merit and faces the same fate, dismissal.

IT BE AND IS HEREBY ORDERED THAT:

1. The appeal is dismissed.
2. The appellants to pay costs on the ordinary scale.

TAGU J:.....

MAXWELL J:.....Agrees

R Chibaya Law Chambers, appellants' legal practitioners
Mazhetese & Partners, respondent's legal practitioners